BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELIZABETH A. ARMSTRONG	)	
Claimant	)	
VS.	)	
	)	
KANSAS BANK NOTE COMPANY	)	
Respondent	)	Docket No. 1,011,219
AND	)	
	)	
AMERICAN ALTERNATIVE INSURANCE CORP.	)	
AND COMMERCE AND INDUSTRY INS. CO.	)	
Insurance Carriers	)	

ORDER

Respondent and one of respondent's insurance carriers, Commerce and Industry Insurance Company (Commerce) appealed the February 9, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.[1]

ISSUES

Claimant worked for respondent over 15 years. The first 10 years were in data processing. In 1997 she was transferred to the laser printing department. She described her work there as requiring repetitive use of her hands. This is a claim for a series of accidents and injuries to claimant's hands and upper extremities from "9-12-01 continuing through last day of work 4-4-03."[2]

---

[1] American Alternative Insurance Corporation (American) had the workers compensation insurance coverage for respondent through Dec. 31, 2001. Beginning Jan. 1, 2002, Commerce had the insurance coverage.

[2] K-WC E-1 Application for Hearing (filed June 13, 2003).

At the February 5, 2004 preliminary hearing, the only issue before the ALJ was which of respondent's insurance carriers was liable for providing treatment for claimant's work-related injuries. The issue raised at the preliminary hearing did not concern whether claimant's injuries were work-related but rather, which insurance carrier should be liable. The issue on appeal is framed by Commerce in terms of whether claimant suffered personal injury by accident arising out of and in the course of her employment with respondent during its period of coverage. Essentially, this means the issue is date of accident. For purposes of preliminary hearing, Judge Frobish determined that claimant's date of accident should be April 4, 2003, her last day of work.[3]

Commerce contends Judge Frobish erred in finding claimant suffered the injuries to her upper extremities during its period of coverage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board (Board) finds and concludes that this appeal should be dismissed as to the series of accidents and injuries to claimant's left upper extremity and affirmed as to the series of accidents and injuries to claimant's right upper extremity.

At the preliminary hearing, there was no dispute that claimant's present need for medical treatment was the result of an injury or injuries that arose out of and in the course of her employment with respondent. Therefore, that issue will not be considered for the first time on appeal.[4] Accordingly, the sole issue on appeal is which insurance carrier is responsible for the cost of providing medical treatment for claimant's upper extremities. This dispute would be resolved by determining the appropriate date of accident. But that is not an issue listed in K.S.A. 44-534a as jurisdictional and does not otherwise raise an issue that the ALJ exceeded his jurisdiction.[5]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[6]

---

[3] *See Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[4] *See* K.S.A. 44-555c(a).

[5] K.S.A. 44-551(b)(2)(A); *See Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[6] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

The Board is unaware of any provision in the Workers Compensation Act that purports to give the Board jurisdiction to review a preliminary hearing order for redetermining the liability among multiple insurance carriers. The Board was presented with a similar issue in *Ireland*,[7] where, in holding that the Board was without jurisdiction to consider the issue of which insurance carrier should pay for preliminary hearing benefits, the Board said:

> Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.[8]

Finally, counsel for respondent and Commerce contends that claimant is precluded from seeking additional benefits, including medical treatment for her right upper extremity because she settled that claim and thereafter, suffered no additional injuries.

Claimant appeared pro se at a settlement hearing before Special Administrative Law Judge John C. Nodgaard on June 2, 2003. At the beginning of that hearing the ALJ announced:

> The Court: We're here on an undocketed Workers' Compensation case, Elizabeth A. Armstrong versus Kansas Bank Note Company, whose insurance administrator is Risk Enterprise Management Limited. The Court will note for the record that we had a previous hearing on this matter a couple of weeks ago, and that hearing went into an enormous amount of detail with respect to Ms. Armstrong's bilateral upper extremity injuries, specifically the issues concerning her right to file a claim for a whole body impairment, and that at that time she was seeking to settle the case with respect to only one of the upper extremities. We're here again today to attempt to settle this case based upon an injury to only one of the upper extremities. I'm not going to elaborate all the issues that we discussed in that previous settlement hearing, because the transcript was made and both parties have copies of that. But for the purposes of this hearing this afternoon, I am going to incorporate the issues that were discussed in that matter as they reflected the explanation to Ms. Armstrong of the rights that she was giving up with respect to the whole body impairment. In any event, with that understanding, counsel, and Ms. Armstrong, do the parties agree to the facts as outlined on this settlement sheet, including a date of accident of September 12, 2001; that the place of accident was in Wilson County, Kansas; that the average weekly wage was $575.30; temporary total was paid in the

---

[7] *Ireland v. Ireland Court Reporting,* No. 176,441 & 234,974, 2002 WL 985408 (Kan. WCAB. Feb. 1999).

[8] *See Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

amount of $2,080.02 and medical has been incurred in the amount of $8,592.52; is that agreed, Ms. Armstrong?

The Claimant: Yes, it is. [9]

. . . .

The Court: And there is another insurance company involved with respect to possible claims for the injury to the left arm, correct?

The Claimant: That's right.

The Court: All right. You understand that if you settle this claim this afternoon as it relates to Kansas Bank Note and their insurance administrator, that any medical expense that you may have to incur with respect to your right upper extremity will be your responsibility; you understand that?

The Claimant: Yes, uh-huh.[10]

. . . .

The Court: Now, you remember in that past hearing that I discussed with you in detail that you very well had a right to file a claim for a whole body impairment with respect to both your right and left upper extremities; you understood that, correct?

The Claimant: Yes, I did.

The Court: And as I remember, you even had previously talked to an attorney who told you the same thing, correct?

The Claimant: Yes.

The Court: And you understood that because of your own financial situation that you were willing to give up that claim at least as it relates to this injury of September 12, 2001, with respect to the whole body and were going to settle only with respect to the right upper extremity; you understand that?

The Claimant: Yes.

The Court: And that's still what you want to do today, correct?

The Claimant: Yes, it is.

---

[9] P.H. Trans., Resp. Ex. 2 at 2 and 3.

[10] *Id.* at 4.

> The Court: And, Mr. Stubbs, just I guess for your protection and your client's, you both understand that I am leaving open any possible claim that Ms. Armstrong may have with respect to the left upper extremity and its relation to a possible injury under September 12, 2001?
>
> Mr. Stubbs: Correct. [11]
>
> . . . .
>
> The Claimant: I want to accept the settlement, okay.
>
> The Court: If you accept this settlement then, you are closing out any rights that you have with respect to that right arm as it pertains to the Kansas Bank Note Company and their insurance administrator with respect to any injury of September the 12th of 2001.
>
> The Claimant: All right, I understand that now.
>
> The Court: Okay. I mean if for some reason you would reinjure that right arm, you know, after today, you would have a right to file a new claim with respect to that injury, but you will have to prove by evidence that it is in fact a new injury and not a continuation of the injury that you are settling today; do you understand all that?
>
> The Claimant: I understand that now, thank you.[12]
>
> . . . .
>
> Mr. Stubbs: Ms. Armstrong, just briefly, you understand that by agreeing to accept this settlement, you are closing all issues with regard to your right hand and wrist during your employment with Kansas Bank Note and during the period their work comp insurance coverage was administered by Risk Enterprise Management [American Alternative Insurance Corporation]?
>
> The Claimant: Yes, I do. [13]

The settlement of claimant's right upper extremity claim was specifically for a September 12, 2001 accident. Although the settlement took place after claimant's last day of work for respondent, and furthermore was based upon an impairment rating issued by Dr. Harry A. Morris in January 2003, it is clear that counsel for respondent did not intend

---

[11] *Id*. at 5 and 6.

[12] *Id.* at 8.

[13] *Id.* at 9.

to include in the settlement any aggravations claimant may have suffered after American Alternative Insurance Corporation went off the risk.

> The Court: Then after reviewing the worksheet for settlement, hearing statements of counsel and testimony from the claimant, the Court will find the proposed settlement is fair, just and reasonable and will approve the same, and I will order Kansas Bank Note Company and its insurance administrator to pay to the claimant $4,500 **for a full, final and complete settlement of all claims with respect to claimant's right upper extremity as it relates to an injury of September 12, 2001** and upon the payment of said sum, it will constitute a full redemption in accordance of KSA 44-531. I think the record is clear, but I will make it abundantly clear that this matter does remain open for any possible claim the claimant may have with respect to the left upper extremity and a possible date of September 12, 2001, and by no means closes out any issues that the claimant has with respect to later claims with respect to the left upper extremity as it relates to a different insurance carrier. (Emphasis added)[14]

It is clear that the settlement was not intended to cover any aggravations of claimant's right upper extremity injuries caused by her work after December 31, 2001, the last date American Alternative Insurance Corporation provided respondent workers' compensation insurance coverage. Respondent and Commerce raise an issue concerning whether claimant suffered any aggravation during its period of coverage. The ALJ answered this issue by stating "[a]s to the settlement the Claimant received on June 2, 2003, the Court does not find it would be proper to set aside this settlement, however, at the time of final Award, a credit for preexisting impairment would be determined."[15]

Because claimant settled her claim for her right upper extremity injuries during American's period of coverage (or at least through September 12, 2001) and therefore is precluded from re-asserting that claim, claimant must prove that she suffered new accidents and aggravations due to her work activities after December 31, 2001 (or September 12, 2001). American contends that claimant's right upper extremity condition and need for treatment is a direct and natural consequence of her preexisting condition. Conversely, claimant contends she suffered a series of aggravations to both upper extremities each and every working day until April 4, 2003, her last day of work for respondent.

For the most part, claimant performed the same job after December 31, 2001 that she had performed before that date and before September 12, 2001. She therefore continued to perform the repetitive tasks that had caused or contributed to her repetitive use injuries.

---

[14] *Id.* at 10 and 11.

[15] Order (Feb. 9, 2004).

The only thing that changed, other than the settlement, was that claimant underwent carpal tunnel release surgery on her right upper extremity in May 2002. The medical evidence is mixed as to whether claimant suffered an aggravation to her right upper extremity condition following her return to work after surgery. Claimant's testimony is likewise inconsistent on this point. The Kansas appellate courts, however, have decided to employ a bright line rule with regard to repetitive trauma injuries.

Following creation of the bright line rule in the 1994 *Berry*[16] decision, Kansas appellate courts have consistently grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[17] which is one of the most recent decisions on point, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use of mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued plain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[18]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[19]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held the appropriate date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The *Lott-Edwards*[20] decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day-worked rule is applicable if the work performed in an

---

[16] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[17] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[18] *Id.* at Syl. ¶ 3.

[19] *Id.* at Syl. ¶ 4.

[20] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

Further, the Kansas Supreme Court in *Depew*[21] held that when both upper extremities are simultaneously injured, the injury is compensable under K.S.A. 44-510e rather than as two scheduled injuries under K.S.A. 44-510d. In *Depew*, the worker's right upper extremity symptoms began before Thanksgiving 1990, the worker underwent right wrist and elbow surgery in April 1991, the worker returned to work in May 1991, the worker began reporting left upper extremity symptoms in September 1991, the surgeon then issued work restrictions, and the worker subsequently left work in December 1991 due to the work injuries. Although the worker's upper extremity symptoms began at quite different times, the Kansas Supreme Court found the worker simultaneously injured her upper extremities. Accordingly, *Depew* stands for the proposition that repetitive use injuries should be compensated as injuries to the body rather than as separate, multiple scheduled injuries.

Considering the *Treaster, Lott-Edwards,* and *Depew* decision, the Board concludes the appropriate date of accident for claimant's series of repetitive trauma accidents is April 4, 2003, the last day that she worked for respondent.

WHEREFORE, the Board dismisses this appeal as to claimant's left upper extremity and affirms the ALJ's February 9, 2004 Order as to claimant's right upper extremity injuries.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

[21] *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

c: Robert R. Lee, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and Commerce Industry Ins. Co.
Thomas J. Walsh, Attorney for Respondent and American Alternative Ins. Corp.
Jon L. Frobish, Administrative Law Judge
Paula Greathouse, Workers Compensation Director